UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

- x

In the Matter of:

SEARS HOLDING CORPORATION, et al.,

Debtor.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

April 27, 2021

10:11 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: JUSTIN WALKER

HEARING re Case Status Conference

HEARING re Motion to Compel: Debtors Third Motion to Enforce the Asset Purchase Agreement (ECF #9395)

HEARING re Opposition Brief / Transform Holdco LLCs Brief in Opposition to the Debtors Third Motion to Enforce the Asset Purchase Agreement (related document(s)9395) (ECF #9426)

HEARING re Response: Debtors' Reply in Further Support of Third Motion to Enforce the Asset Purchase Agreement (related document(s)9426, 9395) filed by Jacqueline Marcus on behalf of Sears Holdings Corporation. (ECF #9436)

HEARING re Declaration of Charles W. Allen in Support of Transform Holdco LLCs Brief in Opposition to the Debtors Third Motion to Enforce the Asset Purchase Agreement (related document(s)9395) (ECF #9427)

HEARING re Declaration of Jennifer Brooks Crozier in Support of Debtors' Third Motion to Enforce the Asset Purchase Agreement (related document(s)9395) filed by Jacqueline Marcus on behalf of Sears Holdings Corporation. (ECF #9396)

HEARING re Declaration of Enrique Acevedo in Support of Debtors' Reply in Further Support of Third Motion to Enforce the Asset Purchase Agreement (related document(s)9436) filed by Jacqueline Marcus on behalf of Sears Holdings Corporation. (ECF #9437)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Good morning. This is Judge Drain. We're here on In re. Sears Holdings Corporation, et al.

This is a completely telephonic hearing. You should introduce yourself and your client the first time that you speak, and you should state your name if you speak later so that the Court Reporter and I can put together your voice with your name.

There's one authorized recording of these hearings. It's taken by Court Solutions, which provides a copy to our clerk's office on a daily basis. If you want a transcript of your hearing, you should contact the clerk's office to arrange for the production of one.

Because the hearings today are completely telephonic, you need to keep your phone on mute unless you're speaking, at which point, of course, you need to unmute yourself.

So with that introduction, I have the agenda for today's calendar and I'm happy to go down that agenda. As I see it, there's only -- there are only two matters on the agenda, the first being a status conference and the second being the Debtors' third motion to enforce the asset purchase agreement.

MR. FAIL: Thank you, Your Honor. Garrett Fail, Weil Gotshal & Manges, for the Debtors. Are you able to

hear me?

THE COURT: Yes, I can hear you fine, thanks.

MR. FAIL: Thank you very much, Your Honor. We'll take the hearing then in the order of the agenda, which for parties' reference is filed at Docket 9440.

The status conference listed as agenda item one is in accordance with paragraph 14 of the Court's confirmation order. The report that I'll provide today is an update to the report my partner, Sunny Singh, gave on January 21st, which was an update to ones that I'd previously provided.

We filed the presentation online prior to the start of the hearing, and that's at Docket No. 9445 for parties that want to follow along or to refer to it later.

Your Honor, do you have it available?

THE COURT: Yes, I have a copy of it in front of me.

MR. FAIL: Thank you. So the presentation highlights the continued progress that the Debtors have made in reconciling administrative claims. They reconciled more than 3,970 to date, up from 3,942 that was at the time of our last report. The Debtors have eliminated more than $1.3 billion in claims asserting entitlement to administrative or priority status, and the Debtors have allowed 1,669 claims in the process.

The chart on the bottom of page 2 of the

presentation shows the positive updates from the last report, a reduction in the Debtors' estimate of allowed opt-out claims by $10 million and an overall reduction in the estimate of remaining administrative claims from $90.1 million in January to $75.8 million today.

Page 3 of the presentation shows the continued progress on post-confirmation distribution, essentially catchup payments for parties that have settled subsequent to the last update. The total now is $42.8 million has been made to creditors post-confirmation pursuant to the program.

Page 4 highlights a reduction in the difference between estimated cash available and projected uses of cash prior to a plan effective date, and the progress is down from $97.3 million difference to $80.8 million.

Page 4 also shows on the source or asset side of the balance sheet a slight reduction in cash on hand as a result of payments that were made since our last report, a decrease in non-cash assets as a result of assets that were monetized, so it's really a reclassification. On the uses side of the balance sheet, Your Honor, we show a reduction in claims estimates and a reduction in other expenses, both positive developments.

The sources are broken out in the same level of detail as we provided in our last report on page 5 of this presentation.

In summary, sources, excluding recoveries from avoidance actions, increased by $2 million since the last report. We'll also note that there's an increase from confirmation date estimates, again, exclusive preference recoveries, and the increase from that is $62.8 million.

Page 6 of the presentation provides a breakdown of the projected uses, again, in the same level of detail as we've previously provided. Actual uses to date remain below confirmation date estimates, despite the extended time pre-effective date. In addition, projected uses through the end of the year would remain within the confirmation date estimate range.

Page 7 of the report shows progress on the avoidance action front: 35 percent in number of actions have been settled, up from 33 percent in the last report; $43.2 million in cash and administrative claim waivers have been achieved, up from $40 million in the last report. And as stated in our last update, emergence remains contingent on the successful outcomes of litigation.

Your Honor, that would conclude the status update portion of today's agenda. And unless you have any questions, which I'm happy to answer or try to answer, I'll turn the virtual lectern over to Jennifer Crozier, who will be handling item two on the agenda.

THE COURT: Okay. Well, before we do that, do any

of the parties on the phone have any questions on the case update? Okay.

MR. SARACHEK: Your Honor?

THE COURT: I'm sorry, go ahead.

MR. SARACHEK: Sorry. This is Joe SARACHEK. How are you?

THE COURT: Okay.

MR. SARACHEK: I represent numerous creditors, and I just need to convey to the Court a widespread feeling among the creditor body, which is they're going broke waiting for this money, the administrative creditors. They don't understand, as you'll recall at one point, we filed a motion for mediation. They don't understand why there can't be a sit down and basically, you know, the matters with ESL can't be resolved.

And I just need to, if the Court wants me to formally reintroduce a motion for mediation again, I'll do it. But it's almost a weekly basis where I get asked about this from one or another one of my clients. And I'm not pointing fingers at anyone, it just defies logic. That's it.

THE COURT: Well, your focus is then on the sources of cash going forward?

MR. SARACHEK: Yes.

THE COURT: Okay. I mean, obviously there is a

built-in mediation feature in the preference litigation, and having seen a number of scheduling orders, it's clear to me that that is being used. So I think your focus again is really on the litigation against ESL and other defendants in the now-consolidated adversary proceedings.

The issue there is that your clients are not the plaintiffs in those proceedings and the plan and confirmation order contemplate, you know, how the claims representation will be handled through the Debtors, but more importantly, the committee.

So I guess -- I don't know if you've raised this with committee counsel, with plaintiffs' counsel in that litigation. I owe the parties a ruling on multiple motions to dismiss the Complaints or portions of the Complaints, which now are consolidated, the most recent motions to dismiss being heard fairly recently.

So I guess you can make the motion, but it would be more effective if it came from one of the parties to the litigation.

MR. SARACHEK: Okay. I'll reach out to the committee counsel.

THE COURT: Yeah. I think you should talk with plaintiffs' counsel about it. Obviously, they cannot waive privilege issues, but I think that's what should be considered here, or that's the avenue you should take here.

MR. SARACHEK: Okay. Thank you, Your Honor.

THE COURT: Okay. All right, anyone else?

MR. CHAFETZ: Yes, Your Honor. Eric CHAFETZ, I represent -- of Lowenstein Sandler. I represent one of the admin claimants who opted into the consent program, GTM Europe Limited.

Just curious if there's any update as to when creditors should expect the next installment payments to be made on account of settled admin claims?

THE COURT: Okay, good question. Mr. Fail, can you answer that or perhaps counsel for the admin creditors group under the admin settlement.

MR. FAIL: I can answer it, Your Honor. It's Garrett Fail again for the record.

We are in contact and coordination with counsel for the creditors' committee and counsel for the administrative claims representative. We don't -- we aren't prepared to announce, you know, anything with respect to a next distribution yet. The information we've provided today shows the assets that we have today, the projected assets in the future, and the Court's aware of other parties that have asserted secured claims in the case.

So we will, as we did before, provide advance notice before any other distribution, but we don't have an update today in terms of the next distribution.

THE COURT: Okay. Well, it seems to me given the cash on hand, you have on here, unless I'm reading it incorrectly, secured claims of, although they are subject to review and objection, I think 17 million. Do those claimants assert claims to the cash?

MR. FAIL: Yes, Your Honor, some of them -- yes, Your Honor.

THE COURT: Okay. And in that full amount or a much smaller amount?

MR. FAIL: I think the largest claim in there -- and don't hold me to this, Your Honor -- but I think the largest claim is the one that was filed by the relator for the qui tam action that you may recall, which has a replacement lien that was granted, so I think that's the largest. And then I think that there are a couple of other smaller claims that haven't been allowed or reconciled yet, but I think the material asserted that hasn't yet been allowed is the qui tam relator action.

THE COURT: Okay. Well, that may well be an appropriate focus sooner rather than later, given I think a legitimate desire to have available cash, subject to reserves of course, continue to be distributed under the administrative claims settlement.

MR. FAIL: Yes, Your Honor. We obviously have our eyes on that in terms of the amount of cash that's available

and in terms of who's in line to receive it. We are also focused on end-of-case strategies, and so, we're examining all options and nothing's off the table, so we want to make sure that, you know, the cases continue to be handled in the appropriate professional manner that they have.

THE COURT: And those discussions include the administrative claims representative?

MR. FAIL: Yes, Your Honor.

THE COURT: As well as the committee.

MR. FAIL: Yes, Your Honor.

THE COURT: All right. Well, I think we should adjourn this conference no later than the omnibus date after the next one and we'll see where we are at that point, so I guess that would be the June omnibus date.

MR. FAIL: Your Honor, the confirmation order provides for quarterly updates, so that may be like one more, but whatever Your Honor prefers, we're available.

THE COURT: Well, I don't know how early in July it is, but I think we can put it in July; that's fine.

MR. FAIL: Thank you, Your Honor. And obviously, if there are material updates, we'll be happy to provide the Court with updates and we remain available for questions.

THE COURT: All right. And then both for Mr. SARACHEK and Mr. CHAFETZ and any other people representing administrative, you can certainly, in addition to speaking

to the Debtors' counsel and the committee counsel, reach out to the administrative claims representative about moving -- steps that could be taken to move along an interim distribution at least in the meantime.

MR. FAIL: Certainly, Your Honor. And again, Garrett Fail for the record. To the extent that parties, you know, have suggestions or would like to make concessions, we're available to hear them. And I know the administrative claim representative has received contacts and is unfortunately somewhat hamstrung by the confidentiality provisions, so we've provided these updates to provide everybody with the same basis of information.

THE COURT: Right. Well clearly, that person though can be a source of information for the other -- for the parties who are subject to the confidentiality agreement. So if counsel for individual creditors have ideas or proposals, they could certainly make them.

MR. FAIL: Of course.

THE COURT: It may not be a two-way dialogue, but they can certainly make those proposals. Okay. Anyone else on the case conference? All right, thank you.

Why don't we turn then to the second and last matter on the agenda, which again, is the Debtors' third motion for an order enforcing the asset purchase agreement. On that matter, I have reviewed the motion and supporting

papers, Transform Holdco's memorandum in opposition and the supporting declaration of Mr. Allen, and finally, the Debtors' reply in further support of the motion and the declaration of Mr. Acevedo attached to it. I've also reviewed the declaration of Ms. Crozier that was attached to the original motion.

So I'm happy to hear oral argument. Let me ask you first, have there been any developments on the motion?

MS. CROZIER: Good morning, Your Honor, and may it please the Court. This is Jennifer Crozier, Weil Gotshal & Manges, for the Debtors -- on behalf of the Debtors rather.

There have not been further developments, and so should it please the Court, the Debtors are prepared to go forward with oral argument this morning.

THE COURT: Okay, that's fine. I have a question or an observation that I want to get out on the table first before we do that. The order granting the Debtors' motion for approval of the Transform transaction and approving the asset purchase agreement was dated and entered February 8, 2019.

It provides in paragraph 53 that, "If there's a conflict between the sale order or the asset purchase agreement and any documents executed in connection therewith, the provision in the sale order and the asset purchase agreement and any such documents shall govern in

that order," in that sequence in other words.

Paragraph 54 states that "The asset purchase agreement and related agreements, documents or other instruments executed in connection therewith may be modified, amended, or supplemented by the parties thereto in a writing signed by each party and in accordance with the terms thereof without further order of the Court, provided that any such modification, amendment, or supplement does not materially change the terms of the asset purchase agreement or related agreements, documents, or other instruments."

And then if you go back to page 2 of the order -- the sale order, that is -- which is a carryover of recitals describing the context of the order, the order refers to, quote, "The Court having reviewed and considered, (i) the sale motion and the exhibits thereto, (ii) the asset purchase agreement dated as of January 17, 2019 by and among the buyer and the seller's party thereto, including each Debtor and certain of the subsidiaries of Sears Holding Corporation, the defined term sellers," and then it has a parenthetical, "(as maybe amended and restated from time to time, including pursuant to that certain amendment no. 1 to asset purchase agreement by and among the buyer and the sellers," then it's the defined term, "the asset purchase agreement)," closed parenthesis, a copy of which is attached

hereto as Exhibit B.

As far as I can tell, neither the docket nor the order that I sent to the clerk of the court to be entered on February 8th of 2019 attach Exhibit B. When I sent the order to be entered, I instructed the clerk to attach the exhibits that were sent to me and they are, in fact, attached to the order, but there's no Exhibit B, so it's hard to say that I reviewed it.

And yet, I believe it is Exhibit B that the parties are currently addressing in this motion, since it changed the terms of the original asset purchase agreement, the execution version that was attached to the sale order as Exhibit A, in particular, in paragraph 2.13 dealing with foreign assets.

So am I missing something here?

MS. CROZIER: Your Honor, Jennifer Crozier for the record again on behalf of the Debtors. No, we don't believe Your Honor is missing anything. By arguing as Transform would have you believe that the parties intended in the first amendment to give Transform the power to take millions of dollars otherwise distributable to creditors for itself and that they intended to give Transform that power without explicitly seeking the Court's approval of what would be a material change.

And as you yourself have pointed out, Your Honor,

the sale order at paragraph 54 requires Court approval of any modification, amendment, or supplement that would amount to a material change. And it's one of the very reasons, Your Honor, why the Debtors argue today that under Section 2.13(a) of the asset purchase agreement, Transform could acquire nothing more than acquired foreign assets. The amendment could not have made the deal any worse for the Debtors or its creditors.

THE COURT: Okay. I was going to say I'm happy to hear something just on this point or Transform's counsel can wait until it makes it, you know, responsive argument. It's up to you.

MR. WEAVER: Your Honor, it's Andrew Weaver of Cleary Gottlieb on behalf of Transform. Just on this point, Your Honor, we know that on February 7th, 2019 at ECF 2599, that the parties filed a substantially final draft of the first amendment of the APA, and that document itself -- it's a redline -- includes the language that's at issue today, and that's found at pages 355 to 56 of the redline.

And so that was submitted to the Court prior to the final day of the sale hearing. And then on the sale hearing, the final day on February 8 -- I'm sorry -- on February 7th, the parties during the hearing discussed the scope and discussed the first amendment, and that's found on page 648 line 8 of the February 7th hearing transcript.

So, Your Honor, it's our position --

THE COURT: Well, no one -- that's the first I've heard of this, of that point. How is it discussed?

MR. WEAVER: Your Honor, I don't have the specifics as to the discussion at that point. I don't believe necessarily this particular language itself was discussed. But the language itself had been submitted to the Court and was before the Court prior to conclusion of the sale hearing.

MS. CROZIER: Your Honor, this is Jennifer Crozier again on behalf of the Debtors, if I may. The first amendment was filed with the Court after the close of evidence. It was just referenced, as Mr. Weaver himself points out, there was no discussion of the substance of this language.

At no point, did the parties say, oh and by the way, Your Honor, under Section 2.13 of the asset purchase agreement, Transform is now entitled to take millions of dollars' worth of cash otherwise distributable to creditors, which in the Debtors' view weighs in favor of the Debtors' argument here that the amendments to Section 2.13(a) of the asset purchase agreement were not, in fact, intended to affect a material change as Transform argues today.

MR. WEAVER: Your Honor, again, it's Andrew Weaver on behalf of Transform.

I know we're getting into more of the substance here and happy to hold my comments in more detail as we get into the actual argument on the motion. But, Your Honor, again, the idea that this is some change as it relates to the acquired foreign assets, you know, there was a negotiation between the parties and the parties entered into this deal granting Transform this option.

You know, we know that the Debtors have made a big deal here about how their own employees within their own subsidiaries felt there wasn't really much cash to be had, there wouldn't be necessarily excluded assets. I can't explain their motivation for entering into the transaction, but that was the deal in plain language that they entered into.

THE COURT: No, but deals in bankruptcy cases are not two-party transactions.

MR. WEAVER: Understood, Your Honor.

THE COURT: They're subject to notice and Court approval, particularly with deals with insiders. And this deal was quite strenuously opposed by, among other parties, the unsecured creditors committee, and a material change that would have been made to the deal after the hearing in which that objection was overruled, I think would require more notice than simply being filed on the docket and actually not provided as an attachment to the Court's order.

I don't really review the dockets in my cases. If I did, I would never do any other work. As we heard in the presentation earlier today and as is evidenced by the agenda today, we are now up to docket item 9427 in these cases. And even at the time of the sale hearing, we were up almost to docket item 1000.

So I do have a serious concern about the context of this, and I appreciate that Ms. Crozier's argument is largely one of interpretation in that context, i.e., how could we have agreed to this if it involved a material change.

But again, it's not just a two-party agreement, and the order itself defines asset purchase agreement as an exhibit that isn't attached; what is attached is the January 17 asset purchase agreement, and then it has paragraph 54, which says you can make changes, but only they're not material, so I find that troubling.

But anyway, why don't we -- is it clear? I just do want to make one -- I want to make sure I understand two points. First, is it clear that the draft of amendment number one that was filed after the close of the sale hearing; that's question number one, or perhaps during the sale hearing as opposed to before the sale hearing? And question number two is, is it clear that when it was mentioned at the sale hearing, there was no discussion of

its material terms as it pertains to this dispute that's now before me?

MS. CROZIER: Your Honor, Jennifer Crozier on behalf of the Debtors. The proposed first amendment to the asset purchase agreement was filed (sound drops) on February 7th after the close of evidence but before closing arguments. And yes, there was a mention of the first amendment, but no discussion of its material terms.

THE COURT: Okay. And Mr. Weaver, do you agree with that?

MR. WEAVER: Your Honor, again, Mr. Weaver, Andrew Weaver for Transform. It was filed, as I said, on the 7th. Just looking very quickly here, it was given -- my understanding from looking at the transcript, it was given to Your Honor at the sale hearing at page 648. But the actual discussion of this particular language, Your Honor, no, we're not suggesting that this particular language was discussed during the hearing.

THE COURT: Okay. And it was provided after the evidence and before or during oral argument?

MR. WEAVER: Yes, Your Honor. It would be day three of the sale hearing.

THE COURT: Okay. So it wasn't introduced into evidence at the sale hearing.

MR. WEAVER: Your Honor, I have to -- I'll be

honest, I need to confirm specifically that question.

THE COURT: Okay, all right. Well, you have the transcript there. It was actually provided to me during oral argument or (sound glitch) some other time with the rest of that stuff?

MR. WEAVER: Again, Andrew Weaver, Your Honor. I'm sorry, I'm just looking at the transcript in real time here.

THE COURT: Sure.

MR. WEAVER: Yeah, I see it at, again, page 648 of the transcript, a copy of the amended APA was provided of the language, the change, and there's a discussion about a number of changes and the redline being provided. But again, I don't see a specific reference of introducing it into evidence, but it was discussed and specifically was raised by counsel for the restructuring subcommittee.

THE COURT: Okay. But is that during oral argument?

MR. WEAVER: Yes.

THE COURT: Okay. All right, thanks. Okay, Ms. Crozier, why don't you go ahead then.

MS. CROZIER: Thank you, Your Honor, and may it please the Court.

There was no discussion of any material change to the asset purchase agreement in connection with the first

amendment simply because there wasn't one and the plan and unambiguous language of the contract makes that clear. I will try to be brief, Your Honor.

The question presented to the Court today is a very simple one: If Transform determined in its sole discretion that it was necessary or desirable to acquire the foreign subsidiaries through an equity acquisition, instead of an asset acquisition, did Transform somehow get more than acquired foreign assets as that term is defined in Section 213(a), and the answer is no.

Section 213(a) makes indisputably clear that if Transform elected to pivot to an equity acquisition, that the equity interest it acquired would be, quote, "deemed to be acquired foreign assets."

In other words, those equity interests would be treated as if they were and as if they had the qualities of acquired foreign assets; that is to exclude excluded assets and to include only assets of the type that would have been acquired assets had they been owned by the sellers as of the closing date.

Now there is no dispute here today that the foreign subsidiary cash is an excluded asset, that's 2.2(s) of the asset purchase agreement, and is not an asset of the type that would have been an acquired asset had it been owned by the sellers as of the closing dated; that's Section

2.1(ee) of the asset purchase agreement. And so, Transform did not acquire it under Section 2.13(a) and it continues to belong to the Debtors.

Now Transform attempts to evade this outcome by pointing the Court away from the four corners of the asset purchase agreement and toward all kinds of extrinsic evidence, but this cannot succeed because the parties agree that the language of Section 2.13(a) is clear and unambiguous.

Accordingly, under governing Delaware law, the Court must give the provision its plain and ordinary meaning and enforce it as written without reference to all of that extrinsic evidence with which Transform fills the pages of its opposition.

Now Transform also argues that the Debtors are barred by the doctrine of acquiescence or are equitably estoppped from recovering the foreign subsidiary cash. But these arguments fail for all of the reasons set forth in our papers, and I won't belabor them here. But I will simply say in short, there was no, quote, "considerable period during which the Debtors failed to act despite some purported knowledge that millions and millions of dollars in cash was sitting in the Indian and Hong Kong bank accounts as of February 11th, 2019.

In fact, quite the opposite is true. The Debtors

have been acting ceaselessly, in fact, as Your Honor well knows, to recover excluded assets from Transform since just after the closing date, despite having had considerably less information concerning the nature and existence of some of those assets than Transform.

Accordingly, Your Honor, we respectfully request that the Court grant the Debtors' third motion to enforce and enter an order compelling Transform to transfer to the Debtors $6,307,656 in foreign subsidiary cash.

I'm prepared to answer any further questions that Your Honor may have; otherwise, I will yield the virtual podium to Mr. Weaver.

THE COURT: Okay. Both sides, I think do, in fact, assert that amendment number one is unambiguous as far as the meaning of Section 2.13, but I think that it's pretty clear that they each assert that it's unambiguous in favor of their interpretation.

And I guess the point there that I would like to focus you on is that the language itself says that the shares will be treated as acquired foreign assets, and it doesn't say anything about the assets of the companies themselves. Does that -- I guess what you're asking me to read into this document is that the equity interest would somehow being press with the definition of acquired foreign assets, which means that the seller would still own the

exempt assets even though the shares were transferred?

MS. CROZIER: Yes, that's right, Your Honor. The phrase, "deemed to be" operated, practically speaking, to carve those excluded assets out of what was being transferred under Section 2.13(a) precisely to ensure that if Transform elected in its sole discretion and for its convenience to pivot to an equity acquisition, the Debtors and their creditors could be no worse off, and the language deemed to be has that effect.

Again, it's defined in Blacks and all of the cases that we've made reference to in our papers show that deemed to be means to treat something as if it is and as if it had the qualities of some other thing. And it's not only the cases or Blacks that uses deemed in that way; the parties themselves used deemed in that way in other places in the asset purchase agreement.

For example, in Section 4.1 of the asset purchase agreement, the parties agreed that the closing date would be deemed to be 12:01 a.m. New York City time on the date on which the closing actually occurs. Well, the closing didn't actually occur at 12:01 a.m. New York City time, but the parties decided that they would treat the closing date to have occurred for purposes of the parties' interactions or relationship going forward, and that's precisely what happened here.

THE COURT: So, in essence, what you're saying is that all the parties really needed to say was that the sellers shall transfer the equity interests. So this extra clause really has to have a separate meaning, which is that the equity interests are, in essence, limited by the definition of acquired foreign assets?

MS. CROZIER: Yes, Your Honor.

THE COURT: I mean, I guess that ultimately is a question for Mr. Weaver. Why have that extra clause in there if, in fact, the Debtors are selling the assets already, i.e., the equity interest, which are their assets, so they're allowed to sell them.

Okay. I think I don't have any questions other than that at this point, but obviously something else may come up. So why don't I hear from Transform then.

MS. CROZIER: Thank you, Your Honor.

MR. WEAVER: Thank you, Your Honor. Andrew Weaver on behalf of Transform. Your Honor, I think there are two issues. I'd like to try to address the first issue.

We have the issue of what the contract language means, so I want to talk about that. But you've raised this other issue about Court approval, and I want to put that aside just for a moment if I can and have initial discussion just as to what the contract says and what it means.

And if I may, Your Honor, I can answer the

question you just asked kind of in the context of our argument to you today. There is really no question about what the definitions of the two key phrases here means, right. In lieu of means in place of or instead of. There were two options that were given to Transform: an asset purchase or an equity transfer, an equity purchase. And then the language, deemed to be, and then what does that language actually mean as it relates to these terms.

And, Your Honor, I oftentimes hesitate to do simple analogies for contract cases, but I think here it's informative because I think it demonstrates kind of the legal fiction aspect of deemed to be and what that really means in the context of a contract.

It's just by way of a very simple example: If you have a contract where you are going to have an obligation to create a three-sided structure that will define as a triangle, to have the option also to create a circle, which isn't defined, but everyone knows is round, and you shall deem that circle to be a triangle, you've created a legal fiction. It's still a round object; the nature of the object doesn't change. It's just that you satisfy your obligations under the contract if you make a circle as well. You've made a triangle for purposes of the contract.

And the idea that the legal fiction somehow actually changes the thing is not what the case law says and

it's not what the definition means. It's still, in our example, it's still a round shape even though we're going to call it a triangle and by building it, we've satisfied the agreement. And if the contract requires us to paint every triangle green, I have to paint the circle as well.

Here in this instance, the thing is an equity transaction, which is a standard understood commercial transaction. It is the transfer of all assets and liability as part of the transaction. The deemed to be legal fiction doesn't take that item and make it into the definition of acquired foreign asset, it doesn't.

What it does is it means wherever in the APA, however it's used where we're talking about acquired foreign assets, this equity transaction, this thing, will count as that and we referred to that. And for instance, in this agreement under 2.1 in the amendment, there was an addition of section (dd) of 2.1 says that Transform would be acquiring free of any encumbrances acquired foreign assets, and by having the equity transaction be deemed as such, that is picked up by that provision. That is why you're required to have this additional comment, additional language within the agreement.

And the cases, Your Honor, that the Debtors cite, they cite in their reply, even though this is the core of their argument, they cite on the reply, so we didn't get a

chance to distinguish. But the cases they cite are fully supportive of this very straightforward process.

Just two quick examples, Your Honor. In the Lucas case, which they rely on most -- I mean, they cite the general premise, but they don't talk about how the legal fiction is applied to the case. And in that instance, there was a consent judgment and there was an amount due under the consent judgment and the agreement said that that amount due will be deemed to be in trust; that was the legal fiction, there wasn't a trust created.

And the Court was specifically asked to determine whether or not there was, in fact, a trust because it was deemed to be a trust, and the Court found it wasn't; it didn't change the thing. The thing was still money owed under the terms of a consent judgment, but it didn't actually create the trust.

And here in our situation, this language does not mean an equity transaction shall now become an asset sale, an affected asset sale. And even I think more tellingly in another case that the Debtors cite, the Wahl v. Owen case; it's a very simple case. It's a lease agreement where there's a living space provided; it's deemed to be 660 square feet and, in fact, it's less than that. And by making the living space being deemed to be 660 feet, it didn't create additional living space; it was still a

smaller living space.

But what that language meant was that, as the Court found, the tenant could not claim a misrepresentation because they received less than 660 square feet. It was deemed to be, the legal fiction was, well, going to act like it was, but the living space was still the living space; it was still less than 660 feet, and that's the situation here, Your Honor.

And we know that, we know that because we had an equity transfer; it's exhibit to the Allen declaration, Your Honor, specifically Exhibit B. But in that equity transfer, the parties were very clear about what was being transferred; it was all the shares. There was no carveout, there was no mention of anything related to excluded assets. It was an equity transfer; that was enforcing the thing that the parties agreed to under the APA.

The fact it was deemed to be an acquired foreign asset did not change that structure and, in fact, that transaction was effectuated as you would expect any transaction to be. And, in fact, in that purchase agreement, the language of liabilities, which was also added to the APA about Transform taking all of the liabilities for the avoidance of doubt, was specifically included in the SPA for the Hong Kong entity. So the parties brought in language from the APA about the liabilities, but they didn't

bring in anything about excluded assets, they didn't bring in anything about the definition of acquired foreign assets because it was a standard equity transaction.

And, Your Honor, we think it's -- you put your finger on it about how this is even supposed to work; how you're going to, in fact, have excluded assets that don't come over as part of the transfer. I think you would have done it in the SPA. And in the Hong Kong SPA, that wasn't done; there was never a mention of where are the excluded assets.

And frankly, Your Honor, you know, the idea that this might now be a material change, well, you know, under that amendment, Transform took all of the liabilities which was added as a part of the amendment to the AAPA. If that's not really what was to happen, why is that language included and how is that unwound if this, in fact, was not the deal that was struck and approved by the Court.

So Your Honor, on just -- setting aside your approval, but just on the issue of the language of this agreement being plain and straightforward, and what does it mean for this legal fiction. Your Honor, we think it would be very difficult to read into this agreement, as you said, some type of carveout of the equity transaction when it's very clear why you have the language deemed to be in the agreement.

I want to pause there, Your Honor, as to the language of the agreement and see if you have questions on that specific aspect.

THE COURT: Well, I actually have a question on in the in lieu of point.

MR. WEAVER: Sure.

THE COURT: Isn't in lieu of not really in substitution for, but just, in essence, supposed to be an exchange, one thing for another?

MR. WEAVER: Rather than doing option one, you can do option two instead of.

THE COURT: You think it's instead of, as opposed to just they're really the same things except for the form?

MR. WEAVER: Correct. It's an option, it's a choice; it's not the same thing. You wouldn't, I don't think --

THE COURT: Well, I know it's a choice. I guess the question I have though is whether the commonly understood meaning of in lieu of doesn't mean a completely different choice, but rather a choice that's basically the same as the original choice but for its form.

MR. WEAVER: Your Honor, respectfully, I don't think that's the case. And, you know, we cite to the definition in our papers in place of/instead of, and I don't think that that definition has been questioned by the

Debtors. Instead of means you're not doing the first thing, you're doing something else, it's in placed of. We're developing a mechanism to sell, to transfer these foreign assets. And here is an asset purchase structure; instead of that, we might do an equity transfer.

And, Your Honor, I would just add -- and again, I know it's the four corners, but, you know, it's not -- it's a little bit surprising, Your Honor, that when the Debtors first made this demand of Transform. This wasn't their interpretation of the agreement. They didn't cite to the deemed of language. And then the second time they made a demand, they didn't cite to this language.

Transform's interpretation has been consistent throughout because, again, we think it is the plain reading of this language.

THE COURT: Okay.

MR. WEAVER: Your Honor, I'll -- I'm sorry.

THE COURT: Just going back to the point that I was discussing with the Debtors' counsel, you're saying that there is a use for the phrase deemed to be acquired assets because that term is used elsewhere in the agreement and so that would make sure that these shares would fall within that definition.

MR. WEAVER: Correct, Your Honor. On page 14 of our papers, we point to Section 2.1(dd), which was part of

the amendment; this was added as part of the amendment to the APA.

THE COURT: You mean 2.1(dd), right?

MR. WEAVER: It's 2.1(dd).

THE COURT: Right, okay. Let me just take a quick look at that. But this was -- I'm sorry, I guess I'm confused -- this was added in the amendment itself.

MR. WEAVER: Correct.

THE COURT: So it didn't incorporate -- I understood your argument to say that there were other provisions of the asset purchase agreement that had already been negotiated. I'm sorry, I'm looking at another provision. But it's self-referential. Acquired foreign assets shall have the meaning set forth in 2.13(a); that was what was in the original amendment -- I'm sorry, the original agreement.

MR. WEAVER: The original agreement.

THE COURT: Excuse me, the original agreement.

MR. WEAVER: Yes, Your Honor.

THE COURT: And then (dd) just says, "Subject to Section 213, any acquired foreign assets are acquired."

MR. WEAVER: Correct.

THE COURT: So how was the clause being added in amendment number one referring to any existing provision of the asset purchase agreement, as opposed to --

MR. WEAVER: Well, Your Honor -- sorry.

THE COURT: -- also added in the amendment.

MR. WEAVER: Well, Your Honor, I think the point is that although it was added as part of the amendment, this was all part of -- this is all one -- I know we talked about this amendment and we'll come to the other point -- this was one transaction. And as, you know, it's deemed to be makes clear that this non-defined transaction, this equity transaction, that counts as assets being acquired under Section 2.1, free and clear.

THE COURT: But where is acquired foreign assets otherwise used in the original asset purchase agreement?

MR. WEAVER: I believe pre-amendment, it's within the section of 2.13. But again, I guess, Your Honor, the point I'm trying to make is that everything -- this was an amendment, this was a change, and it all has to be read together. I wasn't trying to imply that this was only limited to instances prior to the amendment. This is all --

THE COURT: But your statement in paragraph 31 on page 14 of your objection says that the phrase deemed to be acquired foreign assets -- in essence, you say rather, but I'll put in the word merely -- merely establishes that when the defined term acquired foreign assets is used elsewhere in the APA, these equity interests will be included within that defined term.

But the only example given isn't elsewhere in the APA, it's the same use -- it's the use of the term in the amendment, not elsewhere in the APA.

MR. WEAVER: Apologies, Your Honor, I think I understand the confusion. The APA is defined to be the amendment, the first amendment. I think that's how typically the APA is defined.

THE COURT: I understand. But if the defined term, acquired foreign assets, was used in sections of the original APA and, therefore, you know, you wanted to make sure that the defined term as used throughout the APA would apply to the stock, I think I understand your argument.

But if it really wasn't used anywhere else, it's only used in the amendment, I don't understand the argument because then it doesn't seem to me that there's any use for that phrase because it's not being used elsewhere in the original APA.

MR. WEAVER: Well, I guess, Your Honor, just to point out the hypothetical. Let's say that language is not used and we have just the equity transaction, there could be a dispute -- I'm not saying this would happen -- there could be a dispute about whether or not we somehow, Transform somehow took those assets through the equity transaction were somehow encumbered where there was a claim against them.

If we don't have the amendment, but we just we don't use that deemed to be and include then in 2.1(dd), there's -- again, I'm not saying this necessarily would happen, but there is a gap there. There's an opportunity to say that we did not acquire those equity interests in the same manner as we acquired everything else laid out in 2.1.

THE COURT: Well, but if that's the case, then that was the problem with the original agreement because it's added to 2. -- let's see, let's go to the -- 2.1(dd) is a new term and that is the acquired foreign assets. In other words, even though it apparently was, it was defined as a defined term in the original APA, it was not listed specifically as an acquired asset, i.e., acquired foreign assets, although it did fit in, I think, the general rubric of acquired assets.

MR. WEAVER: Your Honor, you're correct. But even if you see that addition as a correction, that protection would not apply to the equity transactions unless it was included within that definition.

THE COURT: Well, actually, it would because it was assumed that it would when the parties entered into it in the first place because it was just an acquired asset. The definition of foreign acquired assets was only used in 2.13 apparently in the original document.

MR. WEAVER: Correct, Your Honor.

THE COURT: So there was really no reason to add that deemed language to somehow include it in terms that were already being used in the original agreement because they weren't being used. The operative language of the 2.1, the acquired assets, just defines it generically in the original agreement, i.e., assets, properties, and rights related to the business, other than the excluded assets; that's 2.1, and then it lists the specific one, but those aren't the only ones.

So I guess if that's -- this point is a neutral one to me is between the Debtors and Transform. I did have another question related to this. Rather than saying, shall be deemed to be an acquired foreign asset, why didn't it just say shall be an acquired asset or an acquired foreign asset, the stock shall be. It didn't say that, and that's really what you're basically saying, right?

MR. WEAVER: Respectfully --

THE COURT: You need to say it needs to be.

MR. WEAVER: Your Honor, I apologize. I think frankly, the shall be would I think be more supportive of the Debtors' position because you're going to make that equity transaction be defined, actually meet that definition. But by saying shall be deemed to be, it's that legal fiction, it's creating the fiction; it never becomes the defines term. And none of the cases that the plaintiffs

or the Debtors cite have the item that's deemed to be, it doesn't change, it doesn't become the defined term.

And so, you know, if the parties wanted this to be, in fact, just a way to do an asset purchase with excluded assets, then you would want to make the equity transaction something different than an equity transaction. But by having it be deemed to be, you created this legal fiction. And again, it's not only the idea of a legal fiction, but we know it's what happened.

THE COURT: Well, that's a separate point. And frankly, again, what happens in a bankruptcy case is very different than what happens in another case when you have get approval of a material transaction.

MR. WEAVER: Understood, Your Honor.

THE COURT: But again, just to use a legal fiction, I think, makes this more of an acquired foreign asset, i.e., more of the definition in my mind than less. I don't understand why they just wouldn't -- you wouldn't just say it's an acquired asset, as opposed to an acquired foreign asset which has the carveout.

MR. WEAVER: Again, Your Honor, the idea of -- reading the agreement as a whole and putting all the pieces together, you know, including also the idea that there's this explicit reference that Transform is now taking the liabilities. You know, if this was attempting to just

replicate what was as defined an acquired foreign asset in that process, there'd be no reason to vary from that process and you would include excluded liabilities as well. The idea seems to us clear on its face in the agreement --

THE COURT: Well, I guess I would push back on that. You can certainly take liabilities; that doesn't necessarily mean you take assets. I mean, it's convenient--

MR. WEAVER: Correct.

THE COURT: -- to take the stock. You could take the stock under a free and clear order, for example. Since these were non-debtor subs, you can't take the assets free and clear.

MR. WEAVER: Understood, Your Honor. But the point being that the makings of an equity transaction as you just described are understood and are consistent with the idea that we're going to acquire assets and we're going to acquire liabilities, and the deemed --

THE COURT: Well, it doesn't say you're going to acquire assets; it does say you're going to acquire liabilities.

MR. WEAVER: Well, for the avoidance of doubt. It's not as if it's saying they're creating something special; it was for the avoidance of doubt.

THE COURT: Well, it doesn't say for the avoidance of doubt, we're acquiring assets.

MR. WEAVER: No, it says we're acquiring the shares.

THE COURT: Right. And then it says for the avoidance of doubt, that also means we're acquiring the liabilities.

MR. WEAVER: Understood, but it's straightforward that we are, in fact, acquiring the shares. So the idea that --

THE COURT: I'm sorry to interrupt you. In the definition of acquired foreign assets, you don't have the liabilities. It just talks about the assets that you acquire and the assets that are excluded.

MR. WEAVER: Correct.

THE COURT: So I guess you think that you would actually need to clarify since you're clarifying the assets, which -- I mean, the liabilities that you'd also clarify the assets if you were going to get the assets, the excluded assets.

MR. WEAVER: Your Honor, you know, we're within the four corners here. And, you know, the idea that we're going to create this mechanism of somehow carving out assets from the equity transaction -- and again, trying to stay within the four corners -- but when there's never been any indication or any request for any such excluded assets or any mechanism for excluded assets.

THE COURT: I understand that they could have provided, or the parties could have provided that there be condition to the stock transfer, which is that all excluded assets will be transferred to the Debtor or you attain -- well, yeah, will be transferred to the Debtor at the time of the stock transfer.

On the other hand, the Debtors says that's subsumed within the deeming language, deemed acquired for and assets, which also means that you don't need to pay any transfer tax on that transfer; it's just part of the deal.

MR. WEAVER: But, you know, Your Honor, at least from our opinion, it comes back to the fact that the idea of changing the thing, which is what really the Debtors are asking to do, to change this form of transaction, you know, we've not seen any precedent for that, any model for that type of understanding and no case that would provide for that type of mechanism.

THE COURT: Okay. Well, why don't we then go to the point that we started with, which is --

MR. WEAVER: Sure.

THE COURT: -- that assumes, I believe, that there's a significant change to the original agreement. Why should I assume that that change got proper approval?

MR. WEAVER: Your Honor, on that point, you know, as we've said, as I mentioned earlier that, you know, this

information was submitted and understood that it was a part of the docket and put in during oral argument. But to be honest, Your Honor, if that is a concern that you have about whether or not -- if this is -- you see it as a significant change that was perhaps -- if there's a question of whether it was given proper attention, frankly, Your Honor, we'd like the opportunity to kind of -- to brief that point.

It really wasn't raised by the Debtors and, therefore, I think we would like -- you know, there's a lot of history there, Your Honor, and I think we'd prefer to put it in a more organized kind of answer to that question.

THE COURT: Well, what more history is there than what we went through at the start of the hearing?

MR. WEAVER: Well, Your Honor, the idea of the full review of the transcript and what was said, what was done, what was discussed, all those types of things, Your Honor, I think, you know, we would like the opportunity to present it and do a more careful read. Frankly, this was not something that we'd understood was going to be an issue today, so therefore, I just would feel the opportunity to provide more description and perhaps even some precedents from where the situation may have arisen in other instances.

THE COURT: Okay. As far as the Debtors are concerned, what is your response to that, Ms. Crozier?

MS. CROZIER: Jennifer Crozier for the record on

behalf of the Debtors.

Your Honor, it is our position that the agreement unambiguously and, on its face, provides that, to the extent Transform pivoted to an equity acquisition, they could not acquire excluded assets.

And I will make a few points in response to Mr. Weaver's argument, if I may. First, Your Honor is correct: in lieu of means in place of. So all that was happening here, Transform could swap one type of transaction out for another; it could not unilaterally and in its sole discretion alter the economics of the deal in a manner that made the Debtors or their creditors worse off. So the use of in lieu of there actually supports the Debtors' position here and not Transform's.

The second point concerning the fact that deemed to be is merely meant to include the equity interests in the definition of acquired foreign assets. Mr. Weaver, Transform is wrong about that, Your Honor, and there are several places in the asset purchase agreement that make that clear, and the first is the addition of that last clause to Section 2.4 of the agreement in which the parties made clear that the liabilities of any entity that is an acquired foreign asset shall not be excluded liabilities.

The Debtors acknowledge that generally speaking an equity acquisition involves the acquisition of all of the

entities' assets and liabilities. Here, however, the parties, consistent with the economics of the entire deal, the parties made clear that if Transform chose to pivot to an equity acquisition, the excluded assets would be carved out. But we also wanted to make clear that we were not carving out excluded liabilities, which is precisely why we added that last clause to Section 2.4.

Another example in the APA of deemed to be being used is in Section 2.13(b) of the asset purchase agreement. I'm going to turn to it quickly, Your Honor, if I may. There, 2.13(b) relates to minority equity interests in non-US persons. And as you'll see at the very end of that paragraph -- or rather, it's on the first page of -- it's right below; it's right at the top of page 56 of the redline.

It says, "Buyer may elect to acquire other minority equity interests directly from the seller, it being agreed by the parties that such equity interests will be deemed to be acquired for and assets for the purposes of this agreement." Now that provision concerned primarily the Debtors' shares in a Mexico entity.

Sears held less than 50 percent of Sears Mexico and Transform wanted to take those shares. And so, the parties provided for a similar way of acquiring those shares; they would go through the same process for the same

reason. Those shares would form acquired foreign assets and the mechanisms of the asset purchase agreement would flow through and apply to those acquired foreign assets.

But here, because Sears held less than 50 percent of Sears Mexico, there were no assets or liabilities to be included or excluded. We were really just handing -- transferring those shares to Transform.

So here, the parties said, "The equity interests will be deemed to be acquired foreign assets for the purposes of this agreement." Whereas, in Section 2.13(a), where we were carving out excluded assets, we said, "Those equity interests shall be deemed to be acquired foreign assets," full stop.

And then the two other points I'd like to make, Your Honor. First is concerning the authority we've referenced in our brief. It does support our argument here. I can point Your Honor specifically to Johnson against Rambo, which is a case in which the Court would deem a legal action to be against the United States.

Even though the United States was not a party to the action, the Court treated the government as though it were a party to the action and the government filed pleadings and, again, behaved in every respect as though it were a party to the agreement, and that's the point that the Debtors are making here, Your Honor.

By deeming the equity interests to be acquired foreign assets, that deeming changes or governs the relationship of the parties going forward and the nature of the assets, specifically to exclude excluded assets.

And then last but not least, I would point Your Honor to Section 2.1(ee) of the asset purchase agreement, which was also added in the first amendment. And that provision makes clear, Your Honor, that acquired assets include, "Any bank accounts of the sellers as may be agreed by buyer and sellers prior to the closing date, but for the avoidance of doubt, not including any cash in any such bank accounts."

And so, here, this was one of the means by which the parties made clear that Transform was under no circumstances going to acquire excluded assets that the cash or cash equivalents in those bank accounts or any bank accounts being transferred were going to remain with the Debtors.

And again, prepared to answer any questions Your Honor may have concerning those points. Otherwise, I will again yield the virtual podium.

THE COURT: Well, I just go back to my question of you, which is Transform has said it would like some additional time to review the transcript of the sale hearing and to consider whether there is any other response to the

point I began with, which is that at a minimum here, the context of this amendment would, I believe, require meaningful disclosure to the parties in interest and the Court if the agreement is to be interpreted the way that Transform asserts that it is.

And I guess my question of you is, what is your response to that request for additional time?

MS. CROZIER: Your Honor, the Debtors' position is that no further briefing is necessary. The history was laid out at the outset of the hearing today.

THE COURT: Well, you also say in your motion, you refer to paragraph 54 and to the amendments that were made. Let me ask you a related question. In one of the letters that's attached to the papers where the counsel had been talking to each other about this issue, obviously before this motion was filed, and one of the points that counsel for Transform makes is that Transform paid taxes on the cash in India.

And in the response, the letter from counsel for the Debtors says, well, we can -- we'll refund you the tax payment or you can deduct the tax payment from the money you owe us under the APA because that would have been our taxes. Is that still the Debtors' position?

MS. CROZIER: Yes, it is, Your Honor. Or I should be specific and say that any portion of that tax related to

the cash, the Debtors would agree to reimburse that to Transform.

THE COURT: To the cash on the sale date.

MS. CROZIER: That's right.

THE COURT: Okay. And I guess there's another point I'd like to clear up. I gather that the Indian transfer still hasn't occurred; is that true?

MS. CROZIER: Your Honor, Jennifer Crozier. It is, Your Honor. There has been -- there have been delays in connection with that transfer, largely associated with the global pandemic. But I can say that the transfer is now moving forward, and I believe it was in process as of April 21st, 2021, so that is now moving forward.

THE COURT: Okay.

MR. WEAVER: Your Honor, Andrew Weaver for Transform, if I may. On the point on additional time, we really -- Transform really do believe it's necessary to have a chance to really present on this issue. As you noted, the Debtors in their motion, you know, were seeking to enforce the amendment as written as they read it.

And to the extent Your Honor has questions -- has raised a question about sufficient notice, we do believe we have a right to address that fully and properly if that may be a basis for the Court's decision.

THE COURT: Okay. I mean, they did in the first

couple of pages of their objection refer to the sale order, paragraph 54 of the sale order and the subsequent filing of the APA, so it did appear to me to be present, although honestly, not really addressed by either side.

And before I cover this, I want to go back to the original 2.13 and the amendment. Yeah, I guess that's fine. I think I understand both of your arguments on that point.

But what is the response on the argument that 2.1(ee) specifies bank accounts of the sellers, but for the avoidance of doubt, not including any cash in any such bank accounts. I mean, the sellers include -- the sellers who are transferring equity interests.

MR. WEAVER: Your Honor, Andrew Weaver on behalf of Transform.

Your Honor, you know, the sellers -- to be clear, that language applies to the seller's bank accounts, which are not the foreign subs, they're not sellers. You know, that language becomes relevant if --

THE COURT: No, no, but I'm sorry, the sellers are selling the foreign subs.

MR. WEAVER: They're selling the foreign subs, but it's not the seller's bank accounts. They are the foreign subs bank accounts. They wouldn't be picked up by the definition, Your Honor.

THE COURT: I got you.

MR. WEAVER: And so, that only becomes relevant if we go through the definition of acquired foreign assets.

THE COURT: Right.

MR. WEAVER: So it doesn't change the analysis at all, Your Honor.

THE COURT: Okay. All right. I'm going to give you my preliminary ruling on this. I will give you a couple of weeks to address the context of the transaction, namely the motion for approval of the executed APA that was attached as Exhibit A to the sale order, and then the amendment that was filed and is the amendment that the parties have been addressing, dated February 14, six days after the sale order, filed at Docket No. 2599, as well as the draft proposed amendment number one that was apparently filed on the docket sometime on February 7th and provided to the Court during oral argument and after the evidence was closed on that day while the Court had turned to oral argument on approval -- on the Debtors' motion for approval of the sale agreement.

I am also assuming here that there was no discussion of this change that is the subject of this dispute during that oral argument or when it was provided to the Court or thereafter. And frankly, I don't believe it was provided to the Court as a proposed attachment to the sale order.

The parties dispute their intent in entering into amendment number one, and more specifically, the amendment to Section 2.13 of that amendment, as well as related amendments in Section 2.1(dd) and (ee) of the asset purchase agreement.

The parties agree on the applicable law for construing the parties' intent under a contract, namely Delaware law, which is the law that the parties chose for the agreement. The primary objective in construing a contract under Delaware law is to give effect of the intent of the parties. Lorillard Tobacco Co. v. Legacy Foundation, 903 A.2d 728, 739 (Del. 2006).

To determine what contractual parties intended, Delaware courts start with the text of their agreement. Sunline Commercial Carriers, Inc. v. Citgo Petroleum Corp., 206 A.3d 836, 846 (Del. 2019). And it's clear under Delaware law that courts interpreting contracts will give effect to the plain meaning of the contract's terms and provisions to best indicate their intent. Lorillard Tobacco, 903 A.2d 739. See also, Osborn Ex Rel. Osborn v. Kemp, 991 A.2d 1153, 1159-60 (Del. 2010).

Further, unless there is an ambiguity in the language of the agreement, Delaware courts interpret the contract terms according to their plan ordinary meaning. Alta Berkeley VI C.V. v. Omneon, Inc., 41 A.3d 318, 385,

(Del. 2012). In construing that plain meanings, the Court must construe the contract as a whole viewing each part in light of the others, which means that the intent of the parties may not be gathered from tax portions of the contract or from any clause or provision standing by itself and meaning which arises from particular portion of an agreement cannot control the meaning of the entire agreement if such inference runs counter to the agreement's overall scheme or plan. EI Du Pont De Nemours v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985).

Finally, a contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rhone-Poulenc v. American Motorists Insurance Co., 616 A.2d 1192, 1195 (Del. 1992). While a court under Delaware law, as noted just now, should not look to parol evidence or extrinsic evidence if the terms of an agreement are not ambiguous.

The Court should consider undisputed background facts to place the contractual provision in its historical setting. S.I. Management LP v. Charlebois, C-H-A-R-L-E-B-O-I-S, 707 A.2d 3743 (Del. 1998) and Eagle Industries v. DeVilbiss Health Care, 702 A.2d 1228, 1233 (Del. 1997).

In the former case, that is the Charlebois case, the setting was important to the Delaware Supreme Court in that the agreement was a multiparty agreement that the Court

said should be construed against the general partner to one part of that agreement, given that multiparty nature where the other parties were limited partners.

That latter point is important here because there is an important bankruptcy law based on the facts as I understand them today on the record of this hearing and the documents on the docket; namely, any transaction out of the ordinary course, including the asset purchase agreement, is not binding on a debtor-in-possession until after notice of hearing and court approval.

The asset purchase agreement here is no exception is subject to extensive notice, that is the original form of the agreement, and substantial objections, including by the Official Unsecured Creditors' Committee. One reason for that extensive notice and the creditors' committee's scrutiny of the agreement is that the agreement was with an insider of the Debtors, Transform, a company controlled by the controlling equity holder of the Debtors and that would, in large measure, take over the Debtors' employees and management.

The Debtors, to protect the estate in light of the foregoing, established a special board committee to negotiate the agreement with Transform and its principal. However, every step of the way, the committee was looking over that committee's shoulders, that board committee

shoulders, and casting a skeptical eye on the asset purchase agreement.

There is no doubt in my mind that Transform's interpretation of the relevant provision to the present dispute, namely Section 2.13 as amended in amendment number one, would materially and adversely to the Debtors' estate modify the agreement that had been noticed for approval and that, at least until the time that a substantially similar version of Docket 2599, namely the executed amendment number one dated February 14, 2019, was filed.

Again, I am assuming it was filed sometime during the highly contested sale hearing, and I believe never introduced into evidence and only generically as an amendment referenced in oral argument to the Court, did the agreement provide for, under Transform's interpretation of it, the ability of the buyer to retain what would otherwise have been clearly an excluded asset, namely the cash in the foreign subsidiaries bank accounts.

I believe there is no dispute that the original agreement and the one that was attached to the Court's order approving the Debtors' motion and that agreement as Exhibit A would have provided, based on the interaction of its Section 2.13 and the definition of the acquired assets in Section 2.1, that the cash in the foreign subsidiaries bank accounts would have been an excluded asset and not had gone

to Transform. It turns out that it appears that cash is in excess of $6.3 million or was in excess of $6.3 million on the closing date of the transaction.

The parties disagree as to the plain meaning of Section 2.13, and frankly, the arguments of both sides are reasonable counterbalanced against each other. The Debtor contends that given the clear exclusion of the cash in the foreign subsidiaries bank accounts under the original APA, that the option that the Debtors provided in the amendment to transfer instead of the assets of the foreign subsidiaries, but instead the stock of those subsidiaries was intended to exclude or impress upon that transferor the exclusion of the cash in the bank accounts.

And in addition to the context that I've already described, that was memorialized by the parties' actual language in the added toggle or option provision in 2.13(a), which provided not only that the sellers shall use reasonable best efforts to transfer such equity interests, but also provided which equity interests shall be deemed to be acquired foreign assets, namely shall be deemed to be governed by the definition of acquired foreign assets, which would exclude cash.

The Debtors also assert that the phrase embodying the option, which states that if at any time prior to the date, that it's 60 days after the closing date, the buyer

determines in its sole discretion and notice by the seller that may be necessary or desirable to acquire all of the equity interests in the foreign subsidiary in lieu of the acquisition of assets and assumptions and liabilities contemplated by the first sentence of this Section 2.13, i.e., the original provision of 2.13, then the seller shall use reasonable best efforts to transfer such equity interests, and then it adds, "which equity interests shall be deemed to be acquired foreign assets."

The Debtors assert that the phrase "in lieu of" should be construed as not simply a switch to a very different transaction that would capture the cash for Transform, but instead a transaction that, albeit in different form, would be in place of and substantially consistent with the original and exclusive right of Transform, which was to buy the assets and related liabilities.

Transform contends to the contrary that in lieu of means simply instead of, and that can be instead of and very different from, as opposed to instead of and similar to except different in form, and that the phrase shall be deemed to be acquired foreign assets merely incorporates the definition of acquired foreign assets as it applies to the sold equity interest that it has the option to buy under this amendment.

The problem with that interpretation, that latter interpretation, is that the phrase acquired foreign assets really had not meaning in the original agreement and only applies to terms in the amendment which are, in essence, self-referential to paragraph 2.13.

So while it is generally within the contemplation of people that when you buy stock, you get the underlying assets of the company whose stock has been sold to you, subject to any claims against that company, of course, which would have priority over the stock.

The context here would argue a more nuanced reading of this agreement and would accord more weight to the Debtors' interpretation of the phrase, "deemed to be acquired foreign assets," namely, that the parties put that provision in this agreement where they wouldn't have had to otherwise because they intended to exclude from the assets transferred the cash and other excluded assets from the businesses that were transferred.

Of course, one could have documented this to specifically provided for that and the parties did not do that. And one could have made it clearer than simply using the phrase, "in lieu of," which is often misused simply to reflect any change, even if it's a dramatic change, from what was supposed to be in its stead, although I believe the proper usage of the term contemplates a change in form and

not in value, i.e., X in lieu of salary, and they did not do so.

However, given the overall context here and, importantly, the fact that it does not appear to me that the material change that would be represented by Transform's reading of this provision was, in fact, ever described to the Court or in any meaningful way before parties in interest and the Court, and indeed was not approved by the Court when it entered into -- I'm sorry -- when it signed and entered the sale approval order, which did not attach the Exhibit B that was supposed to be the amendment and only attached the original agreement, and then provided in paragraph 54 that changes could be to the asset purchase agreement only if they were not material.

I find that the Debtors' interpretation is the better interpretation, and that any balance as between the two should be construed against Transform, given the circumstances of the submission of the amendment -- or non-submission rather -- to the Court and parties in interest in any way that would highlight the important change that Transform's interpretation would provide for.

It is in that context much more logical to assume that the Debtors' interpretation was correct and that it, therefore, believed that the Debtors and Transform therefore believed that disagreement really did not represent a

material change from the asset purchase agreement that was attached as Exhibit A to the sale order and that was before the Court and the parties in interest at the sale hearing.

Transform has argued that at this point, the Debtors should be equitably estopped from taking their position and/or be deemed to have acquiesced in Transform's interpretation, but I conclude that Delaware law on both of those equitable doctrines would not, in fact, apply here.

The doctrine of acquiescence is a doctrine that requires a showing of the acquiescence, which would then be binding on a party in interest, where that party has full knowledge of his rights and material facts at the time and remains inactive for a considerable period of time or freely give recognition to the act or conducts himself in a manner inconsistent with any subsequent repudiation of the act, thereby leading the other party to believe the act has been approved. Cantera v. Marriott Senior Living Services, Inc., 1999 WL 18823 at page 8 (indiscernible) Feb. 18, 1999.

Here, the facts which are uncontroverted as set forth in the declaration of Mr. Acevedo show that the Debtor did not have the critical fact of the dollar amount of cash in the Debtors' bank accounts -- again, I'm referring to the Acevedo declaration as to the circumstances why they did not have that knowledge -- until well after the stock transfer. And really rather shortly thereafter, albeit with an

exchange of correspondence where they made demand and tried to resolve the matter without the need for litigation, commenced this litigation. That set of facts does not fit into the acquiescence doctrine in Delaware.

Moreover, again given the notice requirements for such a change if Transform's interpretation is correct, the other party, i.e., Transform, should not reasonably have believed that merely the Debtors' inaction, even assuming there was inaction, was sufficient to really think that this material change had received the requisite approvals, i.e., after due notice and Court approval.

Similarly, the doctrine of estoppel is applied under the law of Delaware would not apply here. The type of estoppel asserted by Transform is equitable estopped; that has been defined by the Delaware courts as, quote, "A narrow doctrine that is sparingly invoked." Hallisey, H-A-L-L-I-S-E-Y v. Arctic Intermediate, LLC (2020 Del. Chancery) Lexis 331 at page 8 (Del. Chancery, Oct. 29, 2020). And according to the Hallisey Court, the party asserting equitable estoppel bears the burden of proof, which is clear and convincing evidence.

Here, there is not clear and convincing evidence that the elements of equitable estoppel have been established. Those are when a party by its conduct, intentionally or unintentionally, leads another in reliance

upon that conduct to change position to its detriment. Id, quoting American Family Mortgage Corp. v. Acierno, 1994 Delaware Lexis 105 at page 14 (Del. Supreme Court, March 28, 1994).

In addition, courts in Delaware require the party asserting estoppel to show that it, quote, "Lacked knowledge or the means of obtaining knowledge of the truth," in order to prevent parties who were willfully reckless (indiscernible) and blind to the truth and exploiting estoppel to their advantage. HC Companies v. Myers Industries, M-Y-E-R-S, 2017 Del. Chancery 833 at page 14 (Del. Chancery, Dec. 5, 2019).

Here again, I believe the facts and circumstances whereby this amendment was entered into and, frankly, it appears not reasonably put before the Court and parties in interest, would show that Transform lacked -- has failed to show that it lacked knowledge or means of obtaining knowledge of the truth regarding the proper interpretation of this agreement, and that the issue remained open, notwithstanding the stock sale.

Indeed, the parties have disputed the consequences of the stock sale in interpreting Section 2.13. The Debtor is stating that the stock sale is not the end of the meaning of the provision, and it also includes a limitation on the stock sale, namely that cash and other excluded assets

should be carved out of it, which they only relatively recently learned such assets existed; whereas, Transform has said the interpretation ends with -- begins and ends with the stock sale.

So the conduct, namely the stock sale, to my mind does not constitute leading Transform to rely on that conduct to change its position to its detriment, which it also has not shown for equitable estoppel to be found here.

I will note that, consistent with the equities however, the Debtors continued to propose that Transform can set off from the cash that it would otherwise have to transfer to the Debtors based on my ruling, that portion of the taxes paid by them post-closing based on their holding the cash. To me, that is a proper equitable result and would be the only portion of equitable estoppel that would, in fact, apply here, and the Debtors have recognized it by permitting that deduction.

So that is my preliminary ruling. I will give Transform two weeks to file any declaration exhibit that I can take judicial notice of and/or a memorandum of law to address the facts and circumstances and legal effect of the Court and parties in interest not being apprised until after the record was closed at the sale hearing, and more specifically, not being apprised of any material change as provided for in amendment number one before the sale order

was entered into and the effect of the sale order not actually attaching amendment number one as an exhibit as referenced in the definition of the APA Exhibit B.

The Debtors will have a week if they choose to reply to any such pleadings that are filed within the two-week deadline, and I'll decide whether I will amend my ruling or instead make it my final ruling. If I make it my final ruling, I will ask the Debtors to submit an order consistent with the relief that they've requested, and direct them not to formally settle the order on counsel for Transform, but to copy them on it so that they could confirm that it's consistent with my ruling.

If I decide to modify my preliminary ruling, I may or may not need a hearing. I may simply, again, direct someone to submit an order.

So as far as a deadline is concerned, that would be the close of business on May 11th for any supplemental filing by Transform on that narrow issue and/or fact pattern, and the Debtors would have until May 18th to file and serve a response. Both sent to counsel should email those filings to chambers, and I would also ask you to email a copy of the transcript of today's hearing to chambers.

Does anyone have any questions?

MS. CROZIER: No, Your Honor, thank you.

MR. WEAVER: No, Your Honor.

THE COURT: All right, very well. So I think that concludes this morning's hearing, unless anyone has anything else that I missed on the agenda. Okay, thank you everyone. I'll go off at this point.

(Whereupon these proceedings were concluded at 12:20 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
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Date: April 29, 2021